

MINUTES
Montana Fish, Wildlife & Parks Commission Meeting
FWP Headquarters – 1420 East 6th Avenue
Helena, MT

JULY 8, 2009

Commission Members Present: Shane Colton, Chairman; Dan Vermillion, Vice-Chairman; Willie Doll; Ron Moody; Bob Ream.

Fish, Wildlife & Parks Staff Present: Joe Maurier, Director, and FWP Staff.

Guests: See July 8, 2009 Commission file folder for names of who signed in.
David Coburn, Tongue River Railroad, on conference phone.

A work session was held the afternoon of July 7 to discuss the Tongue River Railroad easement request.

Topics of Discussion:

1. **Call to Order - Pledge of Allegiance**
2. **Approval of Commission Expenses through June, 2009**
3. **Commission Reports**
4. **Tongue River Railroad Easement & Right-of-Way Across Miles City Hatchery - Final**
5. **Swan Valley Fisheries Acquisitions in Lake County – Endorsement**
6. **2009 Wolf Quotas - Final**
7. **2009 Deer and Elk Quotas Outside Biennial Quota Ranges - Final**
8. **Non-game Tax Check-off Project – Tentative**
9. **Marias River State Park/WMA 2009 Deer Hunting Access Regulations – Final**
10. **2009 Antelope Quota Ranges - Final**
11. **2009 Upland Game Bird Bag Limits - Final**
12. **HB 454 Hunting Access Agreements - Final**
13. **2009 Early Season Migratory Bird Regulations - Tentative**
14. **Dredger Ridge Public Access Right-of-Way in Flathead County – Endorsement**
15. **Moore Property Acquisition – Endorsement**
16. **Emergency Closure Administrative Rules - Tentative**
17. **Open Microphone – Public Opportunity to Address Additional FWP Issues**

1. **Opening - Pledge of Allegiance.** Chairman Colton called the meeting to order at 8:30 a.m. and led the Pledge of Allegiance.

2. **Approval of the June, 2009 Commission Expense Report.**

Action: Colton moved and Vermillion seconded the motion to approve the June expense report as presented. Motion carried.

3. Commission Reports. There were no reports.

4. Tongue River Railroad Easement & Right-of-Way Across Miles City Hatchery – Final. Becky Jakes-Dockter, FWP Legal Counsel, led the discussion. The Tongue River Railroad Company (TRR) is asking for an easement to construct a railroad line that would cross through the Miles City Fish Hatchery. The Surface Transportation Board (STB) authorized TRR to cross the Hatchery, and in an October, 2007 decision, the STB directed TRR to negotiate with FWP to resolve remaining issues. Since that time, an agreement has been negotiated which can be entered into, and if not, there is the potential for condemnation proceedings.

Colton is concerned that since the Department of Interior provided significant federal funds for the hatchery and the pallid sturgeon, a Commission decision resulting in a compromise to the hatchery would cause FWP to have to pay the money back.

Bob Snyder, FWP Hatchery Bureau Chief, stated that he and Adam Brooks, FWP Federal Aid Coordinator, met with the USFWS who indicated that they take no issue with the right-of-way going through the hatchery. There is no expectation of repayment of funds if they are used for the purpose they were provided for. Snyder stated that the Miles City Hatchery is one of only five facilities that stock and manage pallid sturgeon in Montana. The hatchery rears the pallid sturgeon and brings in adults to spawn them since there is no natural recruitment in Montana. There has been some documented spawning, but the fry get washed into Lake Sacajawea or Fort Peck Lake and don't survive. The eggs are released at various stages of growth for recovery purposes. The Miles City Hatchery is vital to pallid sturgeon recovery.

Moody said he toured the hatchery, and was informed that the fry are dying in the hatchery and it is not known why. Pallid sturgeon propagation is difficult and is quite new – it has only been done for a decade. Many hurdles have already been dealt with.

This process is fragile. In the event that the railroad is accused of causing the fry to die, how does the Department prove it and arrive at a resolution. Just because we think the railroad is affecting production doesn't mean we can prove it. Snyder stated that all resources are being utilized to resolve the issue at the Miles City Hatchery.

Snyder stated that the railroad is coming through the hatchery with or without an agreement -- the STB has approved it. A sound and vibration study has been conducted on the east side of the property, and comparisons to other hatcheries indicate there should be no negative effects. If it is determined that the railroad does impact pallid sturgeon, the Department can bring up the issues with them then.

Jakes-Dockter stated that the agreement stipulates that TRR is responsible for any additional costs that are borne from issues that come up subsequent to, or as a result of, the railroad, however FWP would have to prove it was the railroad's fault. The USFWS told FWP that there are no issues with repayment of the funds as long as FWP insures that the funds were utilized for the purpose they were intended for. She reiterated that Adam Brooks had discussed the issue of repayment of funds with the USFWS and they had given the "go-ahead". FWP does not foresee any risk of paying back the funds.

Moody questioned acquiring an equivalent of a quitclaim document.

Jakes-Dockter said that would be prudent if one could be acquired, but that possibility is doubtful.

Bob Lane, FWP Chief Legal Counsel, noted that if the Commission grants an easement, the Department has protection through the agreement, but if not, the Department has no protection.

Colton said he prefers a bond rather than an insurance policy. He also asked for a Memo of Understanding that spells out the expectations of the USFWS.

Vermillion asked why there is no provision in the agreement that stipulates that the easement would not take effect until all other landowners have reached a negotiated agreement.

Jakes-Dockter stated that FWP requested two specific provisions which included that FWP not be the first to be developed, and that construction not be only on FWP property. The amended agreement addresses these issues. It is important to keep the protective provisions in the agreement, such as the escalation clause in the insurance policy so that it keeps up with the market, as it may be some time before construction begins.

David Coburn, TRR, said he feels FWP is protected by the agreement. They have agreed that they will not build on hatchery property until all plans are drafted, and a construction agreement is in place to address the entire 81-mile length, not just short segments, from Miles City to Ashland. In addition to the construction agreement, financing for the entire line will need to be lined up and ready to go. Coburn noted that there may be one or two landowners who could be hold-outs, but TRR wants to come to terms with them and not use condemnation action unless it becomes necessary. The USFWS was an active participant in the proceedings with the STB, and was involved in the Miles City Hatchery issues. The USFWS wrote a biological opinion, and concluded that with mitigation conditions they did not feel the railroad would adversely affect pallid sturgeon. Studies to date indicate that there will be no noise or vibration impacts that exceed the level already present at the hatchery.

Ream asked why an alternate route was not chosen through less desirable ground.

Jakes-Dockter replied that the STB has the authority to permit a railroad as to where it will be constructed, and this is the location they approved. Extensive review and environmental impact statements were conducted. FWP commented throughout the whole process on perceived impacts, and made suggestions as to alternate routes for construction of the rail line, but the STB selected this route. TRR has agreed that they will not construct until they procure all of the necessary land along the entire rail line.

David Coburn, TRR, concurred, saying that the routing of the railroad was extensively studied before this route was selected by the STB. Other routes were not selected due to a variety of factors. Coburn said if they had all of the land today, and everything was ready to go, they could begin, however, they don't have all of the land or a construction contract. After all land is procured, they can exercise the right to construct.

Moody said he researched information and examined the site, and feels that the value of the hatchery could have been better protected. What is the force of authority of comments? The substantive decisions have already been made.

Colton said he is not comfortable with the word "approximate" in the agreement.

Jakes Dockter said TRR will have to obtain an appraisal of the property and pay just compensation. Other landowners will not be affected by this appraisal, as it is the legal reality that every parcel has equal right to enter into an agreement or not. Any appraisal will have to be taken into consideration.

John Christ, TRR, stated that they have to obtain an appraisal on each parcel along the route. They will be consistent in methodology, but each parcel will be addressed uniquely through independent appraisals. The FWP hatchery property is the most unique along the entire line.

Chairman Colton asked for public comment.

Beth Kaeding, Northern Plains Resource Council, said it is a weak agreement and should not be in force until all parcels are obtained and all construction documents are in. There should be a bond in place and not an insurance policy. She asked the Commission to deny the easement of right-of-way.

Mark Dixon, Northern Plains Resource Council, said TRR has no easement on his land yet. This agreement is not good enough, and he urged voting against it. There are other sections of land through Fort Keogh they could use. It is on the floodplain. Pallid sturgeon cannot have a price tag placed on them. The EIS does not include any enforcement on the mitigation measures. There should be a bond rather than insurance. They don't have condemnation powers until they have the entire route approved.

Alexis Bonogofsky, National Wildlife Federation, said the flood plain issue has not been addressed well enough. The EA did not address hazardous materials, and a question of compatible use has not been settled. They urged the Commission to deny the agreement.

Larry Copenhaver, Montana Wildlife Federation, said this is a disturbing situation. It is either sign the agreement or be taken to court. It is a concern to sportsmen. If the Commission signs this agreement, it will have an impact on more than the hatchery area. A sunset clause would benefit the agreement. Will TRR be allowed to sublet the lease? Will there be mitigation through the wetlands? There are no absolute assurances.

Mike Scott, Sierra Club, urged rejection of the agreement, as it does not protect the public interest or the Miles City Hatchery. TRR needs to post a bond. The EA is incomplete and does not take into consideration the flood plain or hazardous materials the trains could carry. Because it is just a spur line, it does not constitute a common carrier.

Colton suggested postponement of the decision until more information is gathered.

John Christ, TRR, agreed to postponement.

Vermillion said the Commission is in a difficult position. It is challenging to determine what should happen in the state of Montana and what should happen to the hatchery. The Miles City Hatchery is very important. Flood plain issues and bond issues are important. The population of the Pallid Sturgeon is very low in Montana. He agrees this decision should be postponed even though it has been on the table for a long time. He needs to feel more comfortable about a decision.

Ream concurred with postponement. He wants to know if there are other FWP interests in the other properties along the entire stretch, such as block management, fishing access sites, etc.

Moody also concurred with an extension of negotiations of the agreement. More and different issues have been raised. The Commission must protect the hatchery and the resource. Perhaps the alignment of the rail line is not carved in stone.

Doll also concurred with postponement of the decision, and speculated about the possibility of having both a bond and an insurance policy.

5. Swan Valley Fisheries Acquisitions in Lake County – Endorsement. Paul Sihler, FWP Lands and Outreach Supervisor, explained that FWP proposes to acquire fee title to scattered parcels in the Swan River State Forest and in the Elk Creek watershed totaling 2,500 to 3,500 acres. The properties include portions of the Swan River, Woodward Creek, South Woodward Creek, Whitetail Creek and Elk Creek, all important bull trout and westslope cutthroat trout tributary streams in the Swan Valley. Up to \$15.5 million is available for this acquisition from the Bonneville Power Administration Fisheries Mitigation Program. This acquisition would build on the North Swan Valley conservation project that the Commission approved on December 8, 2005. To date, FWP has purchased a 7,204-acre conservation easement and fee title on 1,760 acres at a cost of \$21.7 million in federal and private funding (no state license dollars were used for these acquisitions).

The land is currently owned by Plum Creek Timber Company and is under contract with The Nature Conservancy and the Trust for Public Land as part of the Montana Legacy Project, who wish to sell the land to FWP in order to protect fish, wildlife and recreation values, and provide public access.

Action: Ream moved and Doll seconded the motion to endorse the Department's proposal to work with the Nature Conservancy and the Trust for Public Land to begin the process of acquiring land in fee title in the Swan Valley from Plum Creek Timber Company. Motion carried.

6. 2009 Wolf Quotas – Final. Ken McDonald, FWP Wildlife Division Administrator, said this is a success story of an endangered species. Montana has been managing wolves for the last several years. The management plan calls for maintaining 100 wolves and 15 breeding pairs. At the end of 2008, Montana had 497 wolves. Upon delisting, wolves became a species in need of management. Two lawsuits have been filed in Montana challenging the delisting. It is important to establish a season so as to learn how it affects wolves and the management of them. FWP recommends a conservative quota of 75, which is 15% of the population. FWP feels that a higher quota is a higher risk for injunction.

Management tools include establishing quotas at a time of year so the most current monitoring data can be considered (May and July), creating a 1-800 hotline so hunters can ascertain whether or not wolf harvest is legal (quotas still open), mandatory reporting of successful harvest within 12 hours so FWP can monitor the wolves status, mandatory carcass inspection within 10 days, closure of the season upon a 24-hour notice; authority to close the season prior to reaching the quota when circumstances indicate the quota will be reached within 24-hours; establishment of a definite season end date, regardless of whether the quota was reached, and authority to close the season at any time by order of the Commission. There is absolutely no trapping allowed for at least the first season.

Action: Doll moved and Ream seconded the motion to adopt a Final total wolf quota of 75 with individual WMU quotas/subquota as presented by FWP (WMU 1 – 41 with North Fork of the Flathead subquota of 2; WMU 2 – 22; WMU 3 – 12).

Chairman Colton asked for public comment. There was none.

Action on Motion: Motion carried.

7. 2009 Deer and Elk Quotas Outside Biennial Quota Ranges – Final. Quentin Kujala, FWP Wildlife Management Bureau Chief, presented the proposals. There were ten recommended changes to the tentatives.

- Elk HD 200-00: Reduce antlerless permits from 100 to 5
- Elk HD 200-01: Reduce antlerless permits from 75 to 5
- Elk HD 202-01: Reduce antlerless permits from 100 to 5
- Elk HD 240-00: Reduce antlerless permits from 25 to 5
- Elk HD 261-00: Reduce antlerless permits from 25 to 5
- Elk HD 261-01: Reduce antlerless permits from 50 to 5
- Elk HD 270-00: Reduce antlerless permits from 75 to 5
- Elk HD 270-01: Reduce antlerless permits from 125 to 5
- Elk HDs 204, 261 and 270 north of Rye Ck: Reduce general license cow elk quota thru Darby Check Station from 100 to 25
- Elk HD 270 south of Rye Ck: Reduce general license additional cow elk quota thru Darby Check Station from 100 to 25

Action: Vermillion moved and Moody seconded the motion to adopt as final the adjustments to the 2009 elk and deer quotas as proposed by FWP.

Chairman Colton asked for public comment. There was none

Action on Motion: Motion carried.

8. Non-game Tax Check-off Project – Tentative. Ken McDonald, FWP Wildlife Division Administrator, explained that 87-5-122, MCA, states that “the FWP Commission shall review and annually approve the nongame wildlife program’s projects recommended by the department for funding from the nongame wildlife account.” For the 2008 tax year, FWP received approximately \$50,000 from 3,000 tax returns, resulting in an average donation of approximately \$17. Tax check-off funding is being used in conjunction with State Wildlife Grants to address high priority habitat, survey and inventory, and species conservation needs. The authorized budget for FY2010 is \$68,000, which includes the estimated income plus some carry-over from previous years. With this funding, FWP is proposing the following:

- \$20,000 Prioritize Habitat for Conservation (includes some personnel support)
- \$24,000 Inventory and Monitoring Species of Concern (includes some personnel support)
- \$10,000 Loon Conservation in Northwestern Montana
- \$ 5,000 Post De-Listing Bald Eagle Monitoring
- \$ 5,000 Post De-Listing Peregrine Falcon Monitoring
- \$ 4,000 Educational Publications

Public comment will be solicited upon tentative approval.

Action: Ream moved and Vermillion seconded the motion to approve the proposed tentative Non-game Tax Check-Off work for the Fiscal Year 2010.

Chairman Colton asked for public comment.

Larry Copenhaver said he “cut his teeth on this bill”. This is an opportunity for people to donate money for non-game wildlife. He commended the Department on their proposed use of the funds.

Action on Motion: Motion carried.

9. Marias River State Park/WMA 2009 Deer Hunting Access Regulations – Final. Quentin Kujala, FWP Wildlife Management Bureau Chief, explained that FWP purchased the Marias River State Park /Wildlife Management Area in October 2008. The area was closed to public access until May 1, 2009 to allow for suitable access and regulations development. FWP proposes limited entry deer-hunting access beginning with the 2009 archery and rifle deer-hunting seasons through a lottery system for deer-archery and deer-rifle seasons via a web-based application to equitably allocate hunter numbers and time periods. Accommodations will also be made for those folks who do not use the Internet to enter the access lottery. The general archery season would be split into three two-week time blocks with 10 hunters per time block. The general rifle season would be split into three one-week time blocks with 10 hunters per time block. All hunting will conform to the existing Commission-established season structure in HD 406. Access for antelope, upland bird and waterfowl hunting will not be limited.

Action: Moody moved and Vermillion seconded the motion to adopt a final rule to allow allocation of deer-hunting access to the Marias River SP/WMA by lottery as proposed by FWP. Hunting access of all other applicable species would be allowed on an unlimited basis. Motion carried.

10. 2009 Antelope Quota Ranges – Final. Quentin Kujala, FWP Wildlife Management Bureau Chief, stated there are no proposed changes to the tentatives. Tentatives are as below:

- HD 500 – adjust quota range from 300-600 to 200-600
- HD 501 – adjust quota range from 450-750 to 300-750
- HD 511 – adjust quota range from 250-250 to 250-500
- HD 513 – adjust quota range from 900-1000 to 600-1000
- HD 530 – adjust quota range from 900-1500 to 600-1500
- HD 570 – adjust quota range from 950-1750 to 750-1750

Action: Colton moved and Doll seconded the motion to adopt as Final the six adjustments to the 2009 antelope quota ranges as proposed by FWP. Motion carried.

11. 2009 Upland Game Bird Bag Limits – Final. Quentin Kujala, FWP Wildlife Management Bureau Chief, stated there are no proposed changes to the tentatives, which are:

- Missoula County area (283-50) -- increase from 50 to 100 Fall turkey permits
- Bitterroot Valley area in a Portion of Ravalli County (285-50) -- increase from 300 to 400 Fall turkey permits

Action: Ream moved and Doll seconded the motion to adopt as Final the 2009 upland game bird bag limits and possession limits and fall turkey permit quotas as proposed by FWP. Motion carried.

12. HB 454 Hunting Access Agreements – Final. Under 87-2-513 MCA, FWP received the authority to issue either-sex or antlerless elk permits to landowners for management purposes. The landowner must offer free public elk hunting, meet the various conditions of the statute, and enter a contractual public elk hunting access agreement with FWP. The contract defines the areas open to public elk hunting, the number of elk hunting days that will be allowed on the property, and other factors that FWP and the landowner consider necessary for the proper management of elk on the landowner's property. The Swanz Ranch has been enrolled in this project since 2002, and has received positive post-hunt assessments. The comment period showed that more folks are now aware of these agreements. FWP will insure that information on this program will be more widely dispersed to the public.

Action: Dan moved and Shane seconded the motion to adopt as Final the Swanz Hunting Access Agreement for the 2009 general hunting season as proposed by FWP. Motion carried.

13. 2009 Early Season Migratory Bird Regulations – Tentative. Three proposed changes to the 2008 regulations.

- * Season dates for Rocky Mountain Population of Sandhill Cranes (special drawn permits): September 5 – September 20
- * Season dates for Mid-continent Sandhill Cranes: September 26 – November 22
- * Dillon/Twin Bridges/Cardwell special drawn permits: Increase permits from 50 to 75 (each permitted hunter to have a two-crane bag limit)

Action: Moody moved and Doll seconded the motion to adopt as Tentative the 2009 Early Season Migratory Bird Seasons as proposed by the Department. Motion carried. Four in favor - one opposed (Colton).

14. Dredger Ridge Public Access Right-of-Way in Flathead County – Endorsement. Ken McDonald, FWP Wildlife Division Administrator, explained that Dredger Ridge is a very popular deer and elk hunting area south of the Lost Trail National Wildlife Refuge in Region One. It is owned by Plum Creek Timber Company and is managed as a 15,000-acre walk-in hunting area under the Block Management Program. Access to this area from the south is via a private Plum Creek road the company currently allows the public to use. The south access road passes through two parcels of land that Plum Creek currently has listed for sale. Future public use of these road segments will be subject to permission by the new property owners. Plum Creek is aware of the value of public hunting access in this area and the risk that the sale of these parcels presents to future public use of the area, and has offered to give a public right of way to FWP to continue public access to Dredger Ridge from the south. This right would be gifted to FWP, but FWP would be responsible for cost-share maintenance relative to the public use portion of the road. The road is constructed to a high-use standard and the base is very rocky, so Plum Creek estimates that maintenance costs would be minimal, about \$1,000 every five years. Plum Creek can only transfer the rights for public access to a public entity. Flathead County will not accept new public roads due to budget constraints, and the road does not access any public land.

Action: Doll moved and Colton seconded the motion to endorse the Department's proposal to acquire a public right of way from Plum Creek to continue public access to Dredger Ridge. Motion carried.

15. Moore Property Acquisition – Endorsement. Ken McDonald, FWP Wildlife Division Administrator, explained that this 29.74-acre property is located adjacent to the Blue-eyed Nellie and Garrity Mountain Wildlife Management Areas. Bighorn sheep use the parcel extensively to travel between habitats in Flint Creek and Anaconda-Pintler Mountains, to reach water in Warm Springs Creek, and for forage. Five Valleys Land Trust purchased the property in December of 2008 from the Moore family with financial support from the

Montana Chapter of the Foundation for North American Wild Sheep. The property is a candidate for funding from the Natural Resource Damage Program. In March 2009, FVLT prepared and submitted a grant application to fund purchase of the land and conveyance to the department. Five Valleys Land Trust requested \$142,000 in NRDP funds for FWP to purchase the property, initiate weed control, create a parking area, provide an interpretive panel, remove and construct fences. This fee-title purchase would constitute the fourth addition to the 460-acre Blue-eyed Nellie WMA complex.

Action: Ream moved and Moody seconded the motion to endorse Fish, Wildlife & Park's recommendation to pursue a fee-title acquisition of the Moore property while acknowledging the efforts of FVLT and Montana FNAWS to bring the parcel into public ownership as well as the FWP's interest in continued cooperation with NRDP. Motion carried.

16. Emergency Closure Administrative Rules – Tentative. Bill Schenk, FWP Legal Counsel, explained that the proposed rules would help address problems that FWP faces when emergency situations arise and the Department needs to quickly close streams, wildlife management areas, or Department-owned property to protect the public from imminent danger. The process of contacting Commissioners to reach a quorum for an emergency conference call to institute closures is cumbersome and time-consuming, when time is of the essence.

In 2008, the Commission adopted Administrative Rules that authorized the Department the ability to adopt temporary emergency rules to close public waters to public use in the event of a fire-related emergency. Since that time, emergency closures have been necessary to address situations other than fire emergencies, such as closing a children's fishing pond located downstream from an unsafe dam, and closing floating at Sluice Boxes State Park due to a dangerous logjam. Following these two closures, the Commission delegated authority to the FWP Director to institute closures when necessary for the remainder of the 2009 flood season.

The Department is requesting approval of these rules, which would delegate authority to the Director to close waters and department lands when confronted with any type of emergency situation that may create potential public safety issues.

Action: Ream moved and Doll seconded the motion to approve the rule proposal as written for publication. Motion carried.

17. Open Microphone – Public Opportunity to Address Additional FWP Issues.

Representative Ted Washburn, Bozeman, presented a list of rule change requests he has received from constituents.

- * Allow archers to use Luma-nock on arrows permitting them to see where their arrows hit the animal. The hope is that this will cut down on lost and wounded animals.
- * Allow the use of sabots in muzzle-loading firearms.
- * Go back to the big game tag that uses day and month rather than using the zero to indicate the first nine days of the month. The use of the zero to denote single-digit dates is confusing.
- * Move the firearms big game season one week later to allow greater chance of snow.
- * Institute a Saturday opening day to increase chances of harvest on opening weekend.

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*Action: Doll moved and Colton seconded the motion to adjourn the meeting. Motion carried.*

Meeting adjourned at 12:05 p.m.